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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 173.

THE IRON CLIFFS COMPANY.
THE CLEVELAND CLIFFS IRON COMPANY,
WILLIAM G. MATHER and
MURRAY M. DUNCAN,
Plaintiffs in Error.

vs.

NEGAUNEE IRON COMPANY,
EDWARD N. BREITUNG and
MARY KAUFMAN,
Defendants in Error.

BRIEF IN BEHALF OF DEFENDANTS IN ERROR.

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BRIEF IN BEHALF OF DEFENDANTS IN ERROR.

I.

The Writ of Error should be dismissed for want of jurisdiction.

The record shows that a question which is not a Federal question was presented in the case and was decided by the

Supreme Court of Michigan against the Plaintiffs in Error. The decision of such question is the basis of the judgment of the Court and is sufficient to sustain the judgment.

It is settled law that in such case this Court will not review the judgment of the State Court.

Eustis vs. Bolles, 150 U. S., 361, at 370.
Harrison vs. Morton, 171 U. S., 38, at 47.
Pierce vs. Somerset Railway, 171 U. S., 641.
White vs. Leovy, 174 U. S., 91, 96.
Remington Paper Co. vs. Watson, 173 U. S., 443.
McQuade vs. Trenton, 172 U. S., 636, *639*.
Chappell Chemical Co. vs. Sulphur Mines Co., 172 U. S., 465, *471*.
Capital Bank vs. Cadiz Bank, 172, U. S., 425, *430*.

The non-Federal question upon which the judgment of the State Court was rendered is this:

The Defendants in Error, who were complainants in the suit, claim to be the owners of the lands in controversy, upon which lands a lease, dated September 17, 1857, had been made for the term of ninety-nine years, by Charles T. Harvey, a prior owner, to the Pioneer Iron Company, a corporation organized for the term of thirty years, of the specific personal right to the Pioneer Iron Company, exclusively, to mine and remove from such lands such iron ore, and such only, as it, the Pioneer Iron Company, should actually convert into merchantable iron in its own furnaces or forges which were then in process of construction.

The defendants in error claim that after March 10th, 1866, the Pioneer Iron Company had not mined nor attempted to mine ore from the lands, had ceased to do any business for which it was organized, the furnaces and forges of the company, to which the mining under the lease was made appurtenant,

were not after that date operated by that company, and had been dismantled and destroyed, and no longer existed, and that the charter of the Pioneer Iron Company expired on April 2nd, 1887, and that the company had ceased to exist.

The defendants in error further claim that the defendants in the suit (Plaintiffs in Error) fraudulently combined and planned to obtain for themselves the ore from said lands under said lease by making use of said Pioneer Iron Company as a dummy, using its name as a cover under which they seek to carry on the work of mining and removing ore under the lease, and are engaged in carrying out such scheme. The suit is to enjoin them from such acts.

The Court found that the defendants in error were owners of the lands, that the right to mine ore under the lease was limited to the Pioneer Iron Company, and was made appurtenant to its furnaces and forges existing at the date of the lease; that it had ceased to mine ore many years ago and its furnaces and forges had been destroyed in 1894, and had ceased to exist, and that the defendants in the suit (the plaintiffs in error) were making use of the Pioneer Iron Company as a dummy, and under the cover of its name were seeking to mine ore for their own benefit from the lands, and by the judgment of the Court they were enjoined from such acts.

The Federal question which is claimed by the plaintiffs in error (defendants in the suit) is this solely:

The defendant, William G. Mather, by his amended answer in the suit set up the claim that he owned stock in the Pioneer Iron Company, and if any decree should be rendered in the case in any way declaring a forfeiture or termination or expiration of the lease, or in any way affecting the rights of the Pioneer Iron Company thereunder, said Pioneer Iron Company not being made a party to the suit, he, as such stockholder, and said Pioneer Iron Company, would thereby be

deprived of his and its property without due process of law.

The Federal question was thus made to depend upon the fact that William G. Mather was at the time the suit was instituted, the owner of stock in the said Pioneer Iron Company and being such owner the Pioneer Iron Company should be made a party to the suit.

In reference to this claim the decision of the Court is that the defendants in the suit, the Iron Cliffs Company and the Cleveland Cliffs Iron Company *owned all the stock of the Pioneer Iron Company*, in this manner deciding against the claim of Mather as an owner of stock in that company.

The Court decided that the Pioneer Iron Company had expired by the limitation of its charter, and that the burden of proof was upon the defendants in the suit to show a valid reorganization so as to make it the successor of the Pioneer Iron Company within the terms of the lease, but the Court did not find or decide that such reorganization had been made, holding it unnecessary to consider the question of the defendant's claim of the company's reorganization.

The Court did not decide or declare any forfeiture termination or expiration of the lease *as to the Pioneer Iron Company*, nor in any way prejudice that company in asserting its rights under the lease, either by a suit, or by acts of mining under the lease, nor did the Court decide any question affecting the rights of William G. Mather as a stockholder of the Pioneer Iron Company.

The judgment of the Court was only that *Mather and the other defendants in the suit had no right under the lease to mine ore from the lands, and enjoined them from such mining*.

The Pioneer Iron Company is left free to assert any rights it may have under the lease.

The Court distinctly stated: "The main purpose of the Bill is not to declare a forfeiture of the lease, but to determine the rights of the parties, which depend largely upon the construction of the deeds, the leases, and the various acts and conduct of the parties, extending over a period of more than forty years, and to enjoin a continuing trespass."

Assuming William G. Mather to be a stockholder in the Pioneer Iron Company, and that the company is still in existence, if in fact he, for his own benefit and for his own purposes, but using the name of the Pioneer Iron Company as a cover for his acts, mined ore to be sold to other parties, or to be used in his own furnaces, would the suit against him alone, to enjoin him from such acts, if sustained, deprive him of his property without due process of law, because the Pioneer Iron Company was not made a party to the suit?

It is submitted that there is no ground to contend that the judgment against him enjoining his acts in such case would involve a Federal question, but that is the precise case upon this record in respect to Mather, if in fact he was the owner of stock in the Pioneer Iron Company, and the company had been reorganized and its existence continued.

First. The case presented by the Bill of Complaint and the Answers.

The case stated by the Bill of Complaint is as follows: The lands in question, described in Exhibit "C" of the Bill, (Rec. p. 18) were originally owned by James L. Reynolds, who conveyed them to Charles T. Harvey by a deed dated February 26th, 1857, which includes as a part of the deed a contract executed by Reynolds and Harvey mentioned and marked "A" in the deed, which deed, with the contract, is Exhibit "A" of the Bill of Complaint.

(R. pp. 13 to 15.)

After the execution of said deed Harvey and two associates, organized under the laws of Michigan the Pioneer Iron Company, a corporation, for the period of thirty years, by Articles of Association, dated April 2nd, 1857, which articles are Exhibit "B" of the Bill of Complaint.
(R. p. 16.)

On September 17th, 1857, Harvey executed to the Pioneer Iron Company a lease of certain specified mining rights in said lands for the term of ninety-nine years from said date, which lease is said Exhibit "C" of the Bill of Complaint.
(R. p. 18.)

The lease provides that the lands were leased to the Pioneer Iron Company "for the sole purpose of mining and quarrying at its own expense such ores and marble as may be found thereon, and subject to the provisions hereinafter mentioned, viz:

"Provided, It shall not quarry, mine or remove any ores on said lands except such as *it shall actually convert into merchantable iron in its own furnaces, or forges*, and provided further it shall not in such mining or quarrying operations use or injure any of the improvements which may be placed upon said lands by other persons without paying just and equitable damages therefor, nor shall it occupy in such operations more land than is absolutely necessary to open and work successfully such mines of iron or marble as may be discovered. And it shall purchase and pay at the rate of twelve (12) dollars per acre for unimproved lands which it may require for such purposes. *The rights and easements above mentioned shall descend to the corporate successors of the party of the second part, but not to its assigns.*"

The complainants have acquired all of the title and rights of Reynolds and of Harvey in said lands.

(Rec. p. 5.)

The Pioneer Iron Company erected two stacks or furnaces at Negaunee, in Marquette County, and carried on business until January 1st, 1866, when it ceased to do business *and has never since that time mined or operated under said lease*, but on the contrary from that date abandoned said lease; on the 10th day of March, 1866, the Pioneer Iron Company leased for the period of ten years to the Iron Cliffs Company, a corporation organized under the laws of Michigan, its entire real and personal estate, situated in Marquette County, consisting of its iron works, buildings, lands and rights, subject to certain limitations contained in the lease, and since the making of said lease the Pioneer Iron Company has made no reports to the Secretary of State or to the Clerk of Marquette County, as required by Sections 4005 and 4107 of Howell's Statutes of Michigan, or any report whatever, and that at some time prior to January 1st, 1873, the Iron Cliffs Company became the owner of all the capital stock of the Pioneer Iron Company, and said stock has since that time been held in the names of different individuals for the uses and purposes of the Iron Cliffs Company, and the certificates of stock representing said capital stock of said Pioneer Iron Company have been and are now held in the names of different individuals who are officers, directors, stockholders, agents or servants of the said Iron Cliffs Company, and of the Cleveland Cliffs Iron Company, a corporation organized under the laws of West Verginia, doing business at Negaunee, which two corporations have been operating together in the conduct of their business, and whose officers and agents are in the main the same persons, *and that said stock is held for the uses and benefit of said Iron Cliffs Company and Cleveland Cliffs Iron Co.;* the Cleveland Cliffs

Iron Company claims to have some interest in the property owned or lately owned by said Iron Cliffs Company, and have in some way succeeded to its rights and said Iron Cliffs Company claims some interest in the rights granted in said lease to said Pioneer Iron Company.

The corporate existence of the Pioneer Iron Company expired on April 2nd, 1887, by the limitation of its charter, and became and was thereby dissolved and ceased to exist, and whatever rights said Pioneer Company held under said lease were terminated and extinguished, and such rights reverted to Charles T. Harvey and his grantees.

After the 10th of March, 1866, the furnaces and forges of the Pioneer Iron Company, in which, by the terms of said lease of September 17th, 1857, it was contemplated that the ore referred to in said lease should be manufactured into iron, were never operated by the Pioneer Iron Company, but were operated by the Iron Cliffs Company and its lessees for a number of years thereafter, and the said furnaces and forges were entirely dismantled and destroyed many years ago, and no longer exist and from the 10th of March, 1866, the Pioneer Iron Company ceased to carry on its business for which it was organized, and has never since been engaged in nor carried on any of the business contemplated by its articles of Association.

Recently, and within the past year, the Iron Cliffs Company and the Cleveland Cliffs Iron Company have fraudulently planned to obtain ore from said lands, and falsely and fraudulently pretend that the Pioneer Iron Company still exists and holds said lands, and have made use of the name of the Pioneer Iron Company as a cover under which and by means of which they seek to carry on the work of mining and removing ore from said lands.

The officers and agents of the Iron Cliffs Company and the Cleveland Cliffs Iron Company who are engaged in said scheme and plan to defraud the complainants are William G. Mather, who is president of the Iron Cliffs Company and Cleveland Cliffs Iron Company, and Murray M. Duncan, who is manager and agent of said companies.

The said Iron Cliffs Company, Cleveland Cliffs Iron Company, Mather and Duncan have entered upon the lands *and are engaged in carrying out said plan and scheme*, and are sinking test pits and exploring the lands for iron ore and are preparing to mine and remove ore therefrom, and the Bill charges that they will continue to carry on the work of exploring, mining and removing ore from said lands unless restrained by the Court; the lands are mineral lands and have large deposits of iron ore, and their chief value consists in the iron ore situated therein, and the mining and removing of iron ore therefrom by the defendants would take from said lands their principal value, and would be an irreparable injury to the complainants.

(Rec. pp. 5 to 9.)

The complainants are in possession of the lands.

(Rec. p. 5.)

The claim of the defendants constitutes a cloud upon the complainant's title.

(Rec. p. 10.)

The Bill of Complaint was filed March 3rd, 1900. The appearance of the defendants in the suit, (the plaintiffs in error,) was entered March 12th, 1900.

THE ANSWERS.

Murray M. Duncan filed a separate answer. (Rec. p. 30.) William G. Mather, the Iron Cliffs Company, and the Cleveland Cliffs Iron Company united in the same answer. (Rec. p. 40.)

No Federal question was presented in the original answers.

On June 22nd, 1901, William G. Mather amended the answer filed by himself, the Iron Cliffs Company and the Cleveland Cliffs Iron Company, by adding the following paragraph (Rec. p. 52.):

"And this defendant, William G. Mather, answering for himself, says he owns in his own right and as trustee 3940 shares of stock of said company (The Pioneer Iron Company) and that if any decree be rendered in this case by the Court in any way declaring a forfeiture or termination or expiration of said ninety-nine year lease, or in any way affecting the rights of the Pioneer Iron Company thereunder, that said Pioneer Iron Company not being made a party to this proceeding, he as such stockholder and said Pioneer Iron Company would thereby be deprived of his and its property without due process of law in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States which forbids any State to deprive any person of life liberty or property without due process of law, and this defendant avers that any decision or findings of the Court in any way limiting, terminating, changing, modifying, annulling or diminishing the value of any of the rights of the Pioneer Iron Company under said ninety-nine year lease and as expressed therein would be void and of no effect under said provision of said amendment to the Constitution of the United States."

In no other way is any Federal question presented by the answers of either of the parties made defendant, or is in any way raised in the record on the part of said defendants.

Mather alone can raise the Federal question in this Court which is presented by his answer.

Sully vs. National Bank, 178 U. S., 289, at 297.

In order that there be before this Court the Federal question raised by the answer of William G. Mather it is necessary that it should appear by the record that *when the suit was begun* Mather owned the capital stock of the Pioneer Iron Company as alleged in his answer, and that being such owner the Supreme Court, by its decree, declared a forfeiture, termination, or expiration of said ninety-nine year lease, or in some way affected the rights of the Pioneer Iron Company thereunder, or the rights of said Mather as a stockholder in that company, *and thereby deprived said Mather of his property in said stock.*

Second. The case presented by the evidence.

The evidence in the case shows that *at the time the suit was begun the whole of the capital stock of the Pioneer Iron Company was owned by the Iron Cliffs Company, and that the whole of the capital stock of the Iron Cliffs Company was owned by the Cleveland Cliffs Iron Company*, and in this manner those two companies owned the whole of the capital stock of the Pioneer Iron Company. The defendant Mather did not own any of the stock of that company.

The Supreme Court of Michigan so found the evidence to be, and found that the Pioneer Iron Company was used as a "dummy" and its name employed as a cover for the benefit of the Iron Cliffs Company and the Cleveland Cliffs Iron Com-

pany under which they sought to mine ore from the lands under said lease.

The following facts are shown by the evidence:

1st. The incorporation of the Pioneer Iron Company on April 2nd, 1857, for the term of thirty years.

(Rec. p. 16. Exhibit "B.")

2nd. The lease from Charles T. Harvey to the Pioneer Iron Company of the right to mine ore exculsively for its own furnaces from the lands in question.

(Rec. p. 18. Exhibit "C.")

3d. The conveyances by which the title to the lands was acquired by the defendants in error.

(Rec. pp. 61 to 77.)

4th. The incorporation of the Iron Cliffs Company, on September 4th, 1864.

(Rec. pp. 514, 515.)

5th. The lease made by the Pioneer Iron Company to the Iron Cliffs Company on March 10th, 1866, for the period of ten years, of the Pioneer Iron Company's entire real and personal property, consisting of its iron works, buildings, lands and rights, reserving to the Pioneer Iron Company the right to sell or lease farming lands, etc.

(Rec. p. 78.)

6th. The Pioneer Iron Company never operated its furnaces, or did any mining thereafter.

(Rec. pp. 120, 121, 123, 124, 494, to 499, 503.)

7th. The furnaces and forges of the Pioneer Iron Company were dismantled and destroyed by the Iron Cliffs Company in 1894.

(Rec. pp. 108, 130, 498.)

8th. The Iron Cliffs Company procured to be passed an Act of the Legislature of Michigan, approved March 26th, 1867, authorizing the Iron Cliffs Company to acquire and hold stock in any company formed for manufacturing pig iron, wrought iron or steel.

(Defendants' Exhibit 75, Rec. p. 406.)

9th. September 10th, 1874, the Iron Cliffs Company executed a mortage in trust, to Edmund H. Miller and Abram S. Hewitt, to secure the payment of the bonds of the Iron Cliffs Company, which mortgage recited the above mentioned Act approved March 26th, 1867, authorizing the Iron Cliffs Company to acquire and hold stock in other companies, and reciting that the Iron Cliffs Company "has also become the owner of certain stock in other companies hereinafter mentioned," and mortgaged certain real estate described, and "*all the right, title and interest of the said party of the first part, to and concerning the capital stock of the Pioneer Iron Company*, and the capital stock of the Excelsior Iron Company, both being corporations of the said State of Michigan."

(Rec. pp. 286, 287, 291.)

The mortgage authorizes *the sale at public auction of the shares of stock of the Pioneer Iron Company in case of default in the conditions of the mortgage*, and authorizes the mortgagees, trustees, to make good conveyances to the purchasers at such sale, and also authorizes the trustees to bid at the sale.

(Rec. pp. 291, 292.)

10th. The charter of the Pioneer Iron Company expired April 2nd, 1887, by limitation of the term of its existence by its Articles of Association.

(Rec. pp. 16, 17. Exhibit "B.")

11th. Pretended proceedings were taken to reorganize the Pioneer Iron Company, by articles of reorganization adopted October 7th, 1889, filed in the office of the Secretary of State.

April 8th 1890. (Rec. Ex. "E" 2 pp. 295, 300.) in which articles *the names of the stockholders of the entire stock of the Pioneer Iron Company, and the number of shares held by each are stated as follows*:

(Rec. pp. 297, 298):

Name.	Residence.	No. of Shares.
"John H. Abeel	New York City	10
C. J. Canda	New York City	20
H. Groenemeyer	New York City	10
George M. Miller	Montmoor, N. Y.	10
Alexander Maitland	Negaunee, Mich.	10
Frederick Hudson	New York City	10
Abram S. Hewitt, surviving Trustee	New York City	4,930
Total		5,000 shares."

These proceedings say (Rec. p. 299): "The secretary having examined the books reported that every share of stock, namely five thousand, was represented either in the person of the owner or by his proxy."

It appears by this record that William G. Mather was not the owner of any stock in the Pioneer Iron Company.

At the meeting there were present of those who purported to be stockholders only the Secretary, H. Groenemeyer, and Alexander Maitland, who acted as chairman.

(Rec. pp. 278, 299.)

C. J. Canda, one of the above named stockholders called as a witness by the complainants in the suit, referring to the above proceedings for reorganization says (Rec. p. 475): "In October 1889, I was a director of the Iron Cliffs Company and the Pioneer Iron Company. I was secretary and treasurer of the Iron Cliffs Company and I was probably secretary and

treasurer of the Pioneer Iron Company. I cannot now remember with certainty.

Q. In the articles for the reorganization of the Pioneer Iron Company, John Abele, Alexander Maitland, C. J. Canda, George M. Miller, H. Groenemeyer, Frederick Hudson and Abram S. Hewitt are named as stockholders. Who was Mr. Abele?

A. Mr. John Abele was the president of the Iron Cliffs Company.

Alexander Maitland was a director of the Iron Cliffs Company. I do not remember whether George M. Miller was a director of the Iron Cliffs Company at that time or not. I cannot remember at the moment whether or not he was at one time a director. The estate of his father was a stockholder. Mr. Groenemeyer was a clerk in my office here. He was my clerk. The Iron Cliffs Company never paid him any salary. He worked under my direction for the Iron Cliffs Company. Frederick Hudson was also my clerk. Abram S. Hewitt is the partner of Cooper, Hewitt & Co. He has at different periods been a director of the Iron Cliffs Company but not consecutively.

Q. In the articles of association for the reorganization of the Pioneer Iron Company, John H. Abeel was stated to be the owner of ten shares, who, as a matter of fact, was the owner of the ten shares?

A. The ten shares were given to Mr. Abeel to qualify him as a director.

The same is true about the ten shares in the name of Alexander Maitland Charles J. Canda, George M. Miller, H. Groenemeyer and Frederick Hudson. The shares that stood in the name of Abram S. Hewitt, as surviving trustee, *were delivered over to Mr. Hewitt as collateral to a mortgage made by the Iron Cliffs Company. Some of them may have been*

delivered previously, but they applied to that mortgage.

As I remember they were the shares of stock that are mentioned in the mortgage of September 10, 1874. The mortgage will answer that question. *The 4,930 shares in the name of Abram S. Hewitt, surviving trustee, belong to the Iron Cliffs Company."*

Being called to answer as a witness by the defendants in the suit, he testifies as follows (Rec. pp. 470, 471, 472, 473, 474):

(On pp. 470, 471.) "I was connected with the Iron Cliffs Company about twenty-four years, and with the Pioneer Company after the Iron Cliffs Company acquired control of it. I was secretary and treasurer of both Companies, and at one time a director of both, I think. My connection with these companies extended down to 1890.

I have a recollection of what was called the Pioneer 99 year lease.

Q. Whether or not the Pioneer Company, or yourself as an officer of the Pioneer Company, had in mind during the years prior to 1890 the existence of the 99 year lease, and took it into consideration as an asset of the company?

Objected to as leading, incompetent and irrelevant, and calling for a conclusion of the witness based upon premises not known.

A. Yes.

Q. Will you state generally whether or not the Pioneer Company did business, more or less, during the years up to 1890, while you were connected with the company after the Iron Cliffs Company had acquired a controlling interest in its stock?

Objected to as calling for a conclusion of the witness, and as incompetent.

A. It did.

I knew as a matter of fact, being secretary and treasurer

of the Pioneer Iron Company during that time, that it did more or less business. *The question came up with reference to conveying all the Pioneer Company's real estate and personal property to the Iron Cliffs Company so as to have one title, and it was concluded not to make this transfer because it would do away with this lease which the company considered valuable. The Pioneer Company did all the business that was necessary to protect the property, and to protect its corporate existence."*

(On p. 472): "Q. *You said in your direct examination that the question came up as to the advisability of conveying the property of the Pioneer Iron Company to the Iron Cliffs Company, and that the reason you did not so convey it was because you were afraid you would thereby lose the 99 year lease, so called?*

A. *I did."*

(On pp. 473, 474): "Q. Did not the question of having the lands of the Pioneer Company conveyed to the Iron Cliffs Company come up only at the time this mortgage of 1874 was made, the time when the Iron Cliffs Company had acquired a control of the stock of the Pioneer Company?

A. I am not positive about it. I would not be at all surprised if it came up in 1874 when we made the larger mortgage. I cannot fix that date.

At that time the Iron Cliffs had acquired control of the Pioneer. * * * I surrendered the books of transfer and minute books of the Pioneer Iron Company to Mr. Mather of Cleveland, Ohio, in 1890. They were sent to him at Cleveland. *The stock transfer book would show when the transfer to the Iron Cliffs Co. was made.* The dates would be accurately inscribed, but it might not necessarily show when it was acquired. The cash books or accounts that were sent from here would show when they were acquired. As you are doubt-

less aware, stocks are often acquired with the necessary irrevocable power of attorney, to transfer them at convenience. The transfer might be made at any time later. The cash book, or rather accounts, that were sent from New York, would show the date.

Q. Was there any change so far as you know in the number of shares held by the Iron Cliffs Company in the Pioneer Iron Company in the name of Abram S. Hewitt, trustee, between the time that mortgage was given and the time you sold out to the Pioneer, to the Cleveland parties, if you know?

A. I cannot remember how that was taken back. Of course, they transfered it back so that the company could use it. It may have been left in their hands and it may not.

Q. *But the question is, did not the Iron Cliffs retain exactly the same interest in the stock of the Pioneer Iron Company from the time it pledged that stock in the mortgage given to Edmund H. Müller and Abram S. Hewitt, up to the time that you New York people disposed of your interest in the Iron Cliffs?*

A. *Yes, we retained the same interest.*"

12th. The defendants in the suit put in evidence, under the complainant's objection that the same were immaterial and irrelevant minutes of proceedings taken October 25th, 1890, for the amendment of the pretended articles of reorganization adopted on the preceding October 7th, 1889.

(Rec. pp. 517 to 520.)

In these minutes there purports to be a list of the stockholders and number of shares of stock held by each, in the Pioneer Iron Company, as follows (Rec. p. 517):

Name.	Residence.	No. of Shares
"W. G. Mather.....	of Cleveland, Ohio...	10 shares.
J. H. Wade, Jr.....	of Cleveland, Ohio...	10 shares.
Fred A. Morse.....	of Cleveland, Ohio...	10 shares.

Name.	Residence.	No. of Shares
Selah Chamberlain	of Cleveland, Ohio...	10 shares.
James H. Hoyt.....	of Cleveland, Ohio...	10 shares.
J. H. Sheadle.....	of Cleveland, Ohio...	10 shares.
W. G. Mather, Trustee..	of Cleveland, Ohio...	4,930 shares.
Alexander Maitland....	of Negaunee, Mich...	10 shares."

In this list Alexander Maitland as holder of ten shares of stock, is the only one who appears in the list of stockholders in the above mentioned proceedings, taken October 7, 1889 (Rec. p. 295 to 300 Ex. E 2.) for reorganizing the Pioneer Iron Company. He was a director of the Iron Cliffs Company, and his ten shares of stock in the Pioneer Iron Company were given to him by the Iron Cliffs Company to qualify him as a stockholder.

C. J. Canda, (Rec. p. 475.)

J. H. Wade, Jr., was a stockholder and *director* of the Iron Cliffs Company.

(Rec. pp. 427, 428.)

Fred A. Morse was secretary of the Iron Cliffs Company.

(Rec. p 457.)

J. H. Sheadle served as secretary of the Iron Cliffs Company.

(See testimony of F. A. Morse, R. p. 459.)

J. H. Hoyt was a director of the Iron Cliffs Company.

Rec. pp. 345, 444, 446, 447, 449.)

He was one of the organizers of the Cleveland Cliffs Iron Company.

(Rec. pp. 410, 411, 412.)

W. G. Mather is president of the Iron Cliffs Company.

(Rec. pp. 499, 500.)

13th. There is no evidence in the case showing the transfer

of the stock from those who are named as stockholders in the proceedings taken on October 7th, 1889, (Rec. pp. 295, 297 Ex. E. 2.) for the reorganization of the Pioneer Iron Company to those who are named as stockholders in these proceedings taken October 25th, 1890 (Rec. pp. 517, 518.) nor is there any evidence how or from what source the latter named persons obtained stock or became stockholders in the Pioneer Iron Company.

14th. After these proceedings of October 25th, 1890, were taken *in which for the first and only time before this suit was commenced Mather appears in any way to be a stockholder in the Pioneer Iron Company, and under the date of February* 19th, 1891, *he (William G. Mather) issued a circular to the stockholders of the Iron Cliffs Company, signed by himself and James H. Hoyt, dated February* 19, 1891, *in which a plan is set forth for the consolidation or combination of the Cleveland Iron Mining Company and the Iron Cliffs Company.* (Rec. pp. 345, 346, 347, 348.)

After pointing out how such combination could be carried out in spite of the minority stockholders, and how the statute of Michigan could be evaded, Mather says in this circular (Rec. pp. 347, 348.):

"Third. The Iron Cliffs Company has a valuable privilege which would, necessarily, *be wiped out by the consolidation.* By special legislation, procured by Mr. Tilden, the Iron Cliffs Company now has the peculiar right of owning stock in subcompanies. Under this special legislation *it owns the stock of the Excelsior, and the Pioneer Companies.*"

The circular then proposes a second plan by forming a corporation under the laws of West Virginia *to hold the stock of the Pioneer Iron Company,* and of the Cleveland Company, and issuing instead thereof to the stockholders of those com-

panies the stock of the West Virginia corporation. One of the advantages mentioned for this plan is stated thus (Rec.p. 348):

"5. *No statement of condition or lists of stockholders need be furnished.*"

By this circular, signed by William G. Mather, the fact is stated, and is admitted by him to be, *that at the date of this circular, February* 19th, 1891, *the Iron Cliffs Company owned the stock of the Pioneer Iron Company. He himself, is shown by this statement not to be the owner of any of the stock of the Pioneer Iron Company. He says the Iron Cliffs Company owns the stock.* (R. p. 348.)

James H. Hoyt, who signed this circular with Mather, being called as a witness in behalf of Mather (R. p. 343.) testified as follows (R. pp. 345, 346.):

"Q. I will try and aid you. Do you remember about the month of May, together with Willaim G. Mather, representing the Iron Cliffs Co. having issued about February 19, 1891, a circular to the stockholders of the Iron Cliffs Co., proposing an exchange of their stock for the stock of the Cleveland Cliffs Co. to be organized, or which you were intending to organize in West Virginia?

A. I have a recollection of some such circular. *I think the circular you show me is the circular that was issued. The Iron Cliffs Company owns some of the stock of the Pioneer Iron Co. I haven't examined that part of the circular which states that the Iron Cliffs Co. owned the stock of the Pioneer Iron Co. I have no doubt that statement was true if we made it at that time. I think that was true, though not of record.* They didn't own it of record, the equitable owner of it.

The Iron Cliffs Co. does not own it all now. Outside of the Iron Cliffs Co. Mr. Garretson owns 50 shares of stock, Mr. Hale owns 960 shares, Mr. Peter White owns 10 shares, I own 10 shares, Mr. Perkins owns 10, Mr. Wade, I think,

owns 10, Mr. Samuel Mather 10, and I think there are some other scattering shares owned by other people. I don't exactly recollect. Mr. Garretson and Mr. Hale have owned their stock something like two or three years, I think. I am not quite sure of that, but the other gentlemen have owned their stock, I think, for 8 or 9 years.

Q. Then these gentlemen whom you have named as owing shares of stock in this company have procured the same and became the owners since the issuing of this circular in 1891?

A. No, I don't think so; I think that some of the stock was owned by some other gentlemen I have named prior to the issuing of the circular, but my recollection is not definite about that."

There is no evidence in the case that *from the time said circular of February* 19th, 1891, *was issued down to the commencement of this suit any change was made in the ownership by the Iron Cliffs Company of the stock of the Pioneer Iron Company, or that Mather after that date, or at the time of the commencement of this suit, owned or held in trust, or held in any manner any of the stock of the Pioneer Iron Company.*

15th. Less than three months after this circular of February 19th, 1891, was issued, and on May 9th, 1891, Mather and Hoyt, together with A. C. Dustin, Mr. Hoyt's partner, Fred A. Morse, the Secretary of the Iron Cliffs Company and one Henry S. Sherman, each as owner of one share of stock, formed the Cleveland Cliffs Iron Company under the laws of West Virginia, with an authorized capital of five million dollars.

(R. pp. 410, 411, 412.)

16th. James H. Hoyt in his testimony, called as a witness by the defendants in the suit, says (R. pp. 410, 411.): "*The Cleveland Cliffs (Iron) Company owns all the stock of the*

Iron Cliffs Company and of the Cleveland Iron Mining Company."

17th. Mather is President of this Cleveland Cliffs Iron Company and of the Iron Cliffs Company.

(R. pp. 431, 499, 500.)

18th. E. R. Perkins, a stockholder in the Iron Cliffs Company, and in the Cleveland Iron Mining Company (R. p. 419.) testifies that on May 4th, 1891, he issued a circular to the stockholders of the Iron Cliffs Company a copy of which is Exhibit "A." (R. pp. 419, 420.) in which recommending the combination of the Iron Cliffs Company and the Cleveland Iron Mining Company he says (R. p. 420): "Deeming it for the mutual advantage of the two companies that a combination should be effected, *and not wishing to bring about a consolidation, by which valuable privileges now possessed by the companies would be lost*, the syndicate whom we represent has perfected a plan for the organization of a new company, under the laws of the State of West Virginia, to be known as the Cleveland Cliffs Iron Company, with a capital stock of $5,000,000."

Questioned in regard to the privileges referred to in favor of the Iron Cliffs Company, he says (R. p. 423.):

"Q. Do you not know as a matter of fact, that they did own the stock of the Pioneer Iron Company—the capital stock of the Pioneer Iron Company and the Excelsior Iron Company?

A. *My impression is that the Iron Cliffs Co. had such ownership then, and now.*"

19th. Charles J. Canda, as witness on the part of the defendants in the suit testifies (R. pp. 470 471.) that he "was connected with the Iron Cliffs Co. about twenty-four years, *and with the Pioneer Co. after the Iron Cliffs Co. acquired*

control of it. I was secretary and treasurer of both companies, and at one time a director of both, I think."

"My connection with these companies extended down to 1890."

"I have a recollection of what was called the Pioneer 99 year lease.

Q. Whether or not the Pioneer Company, or yourself as an officer of the Pioneer Company, had in mind during the years prior to 1890 the existence of the 99 year lease, and took it into consideration as an asset of the company?

Objected to as leading, incompetent and irrelevant and calling for a conclusion of the witness based upon premises not known.

A. Yes.

Q. Will you state generally whether or not the Pioneer Company did business, more or less, during the years up to 1890, while you were connected with the company after the Iron Cliffs Company *had acquired a controlling interest in its stock?*

Objected to as calling for a conclusion of the witness, and as incompetent.

A. I did.

I knew as a matter of fact, being secretary and treasurer of the Pioneer Iron Company during that time, that it did more less business. The question came up with reference to conveying all the Pioneer Company's real estate and personal property to the Iron Cliffs Company so as to have one title, *and it was concluded not to make this transfer because it would do away with this lease which the company considered valuable. The Pioneer Company did all the business that was necessary to protect the property, and to protect its corporate existence."*

(R. p. 472.) he says: "Q. You said in your direct exami-

nation that the question came up as to the advisability of conveying the property of the Pioneer Iron Company to the Iron Cliffs Company and that the reason you did not so convey is was because you were afraid you would thereby lose the 99 year lease, so-called?

A. I did.

Q. When was it that that question came up?

A. It is a long while to remember, *but I think it was at the time we made a mortgage, when the first mortgage was made to the Iron Cliffs Co.*"

R. pp. 473, 474.) he says: "Q. Did not the question of having the lands of the Pioneer Company conveyed to the Iron Cliffs Company come up only at the time this mortgage of 1874 was made, the time when the Iron Cliffs Company had acquired a control of the stock of the Pioneer Company?

A. I am not positive about it. I would not be at all surprised if it came up in 1874, when we made the larger mortgage, I cannot fix that date.

At that time the Iron Cliffs had acquired control of the Pioneer."

(R. p. 474.) he says: "I surrendered the books of transfer and minute books of the Pioneer Iron Company to Mr. Mather of Cleveland, Ohio, in 1890. They were sent to him at Cleveland. *The stock transfer book would show when the transfer to the Iron Cliffs Co. was made.* The dates would be accurately inscribed, but it might not necessarily show when it was acquired. The cash books or accounts that were sent from here would show when they were acquired. As you are doubtless aware stocks are often acquired with the necessary irrevocable power of attorney, to transfer them at convenience. The transfer might be made at any time later. The cash book, or rather accounts, that were sent from New York, would show the date.

Q. Was there any change so far as you know in the number of shares held by the Iron Cliffs Company in the Pioneer Iron Company in the name of Abram S. Hewitt, trustee between the time that mortgage was given and the time you sold out to the Pioneer, to the Cleveland parties, if you know?

A. I cannot remember how that was taken back. Of course they transferred it back so that the company could use it. It may have been left in their hands and it may not.

Q. *But the question is, did not the Iron Cliffs retain exactly the same interest in the stock of the Pioneer Iron Company from the time it pledged that stock in the mortgage given to Edmund H. Miller and Abram S. Hewitt, up to the time that you New York people disposed of your interest in the Iron Cliffs?*

A. *Yes, we retained the same interest.*"

20th. To show the facts of the Iron Cliffs Company's ownership of the stock of the Pioneer Iron Company, the complainants in the suit took the deposition of the witnesses in Cleveland who had charge of the books, and they were unable to secure their production.

It is shown that after the subpoenaes were served on the witnesses to produce the books the books were put into the hands of the counsel of the defendants in the suit, Hoyt, Dustin & Kelley, and these attorneys refused to produce the books, or to permit them to be produced.

Frank B. White (R. p. 430.) examined on December 11th, 1900 (R. p. 419.) was employed by the Cleveland Cliffs Iron Company, and had charge of the general books (R. p. 430). He was subpoenaed to produce the books of the Iron Cliffs Company and the Pioneer Iron Company. He didn't bring them as they were not in his control. He declined to bring the books until instructed by the President, Mr. Mather.

whom he might have reached by telephone, he presumes. (R. p. 431).

Examined again February 18th, 1901, (R. p. 442.) the witness says (R. p. 451.) he is the general book-keeper of the Cleveland Cliffs Iron Company and the Iron Cliffs Company, and that he last saw the books of the Iron Cliffs Company and the Pioneer Iron Company within a week or ten days in the Cleveland Cliffs office. They were taken from his desk four or five days before he was served with the subpoena, and he does not know where they were taken to. This is evidence that the books disappeared after notice had been received by the defendants of the taking of his deposition.

Edwin V. Hale, examined December 11th, 1900, (R. p. 419) says (R. p. 433): He was elected secretary of the Pioneer Iron Company in the previous April (April 1900). Acquired stock in the company thirty days before, and on his examination, being advised by Mr. Kelley of Hoyt, Dustin & Kelley, who represented the defendants, he refused to state the circumstances of acquiring of such stock (R. pp. 433, 434, 435). He says he purchased the stock at the solicitation of James H. Hoyt who told him he could buy stock of Mather and William G. Mather delivered him the certificate of stock (R. p 436). He pledged the certificate with a separate power of attorney to borrow the money with which to pay for the stock (R. pp. 436, 437). He says (R. pp. 439 440.) he has not the custody of the Pioneer Iron Company's books, but understands they are in the hands of Hoyt, Dustin & Kelley. After being subpoenaed he went to the office of Hoyt, Dustin & Kelley and made a demand for the books. He told Kelley that a subpoena had been served upon him to produce those books in Court and he was there in pursuance of the subpoena, and Kelley refused to let him have the books. The witness added:

"I will produce those books in Court before the notary here if I can get them from Hoyt, Dustin & Kelley."

At this point the Record says (p. 440):

"Mr. Kelley: Mr. Kelley, who was present representing that firm, desires to state in the record, in order that the gentleman may be saved trouble in this matter, *that Hoyt, Dustin & Kelley will not produce the books in this proceeding and will not surrender them to the witness for the purpose of being produced here.*"

This witness was examined again on February 18, 1901, and says (R. pp. 442, 443): "I now state that I am secretary of the company (Pioneer Iron Company), and I do not know where the books and papers are belonging to the company. I do not know who is the president of that company at the present time. *No books or papers, nor the control of such books and papers have ever been given to me as secretary. I have not performed any official acts to my knowledge.*"

Fred A. Morse, examined December 3rd, 1900 (R. p. 457) says he is secretary of the Iron Cliffs Company. He says (R. p. 459) that he does not know how he came to be appointed secretary of the Iron Cliffs Company except that he was in the office as secretary of the Cleveland Iron Mining Company. Thinks it was a year or two after William G. Mather was made president of the Pioneer Iron Company that he was appointed secretary of that company. He has been employed in the office of the various corporations of which Mr. Mather and his friends have control since 1863. He states (R. pp. 460, 461.) that a subpoena or notice to produce the books of the Iron Cliffs Company was served upon him, but he did not produce the books *as they were delivered to Hoyt, Dustin & Kelley on Saturday after the subpoena or notice had been delivered to him. He requested the attorneys to allow him to bring the books, but the attorneys refused.*

Mr. James H. Hoyt, who was present as counsel for the defendants in the suit was thereupon requested to produce the books and refused to do so (R. p. 461).

The witness says Robert C. Mann, the auditor of the Iron Cliffs Company is the man who took the books and delivered them to Hoyt, Dustin & Kelley (R. p 463).

James H. Hoyt, counsel for the defendants in the suit, examined by complainants February 18th, 1901 (R. pp. 442 443) testifies that he don't know where the books and papers of the Pioneer Iron Company are (at the present time) (R. p. 443).

He says (R. pp. 444, 445): "I have been connected with the Iron Cliffs Co. as counsel during the last seven or eight years. I have also been a director during the same period, if I recollect rightly. * * * I think I am a stockholder in the Iron Cliffs Co. and in the Pioneer Iron Co."

He says (R. pp. 446, 447): "I decline to state whether the Iron Cliffs Company purchased the stock of the Pioneer Iron Company. My information in regard to that came to me in my professional capacity. * * * I don't know of the purchase of the stock of the Pioneer Iron Company by the Iron Cliffs Company *from an examination of the books.* If I have any information on that subject it has to come to me as counsel.

Q. Have you any information on that subject?

A. If I have any information it has to come to me as counsel.

I have a certain information, I will not state that information for the reason that any information I have has come to me as counsel, and is therefore, privileged, and I have no right to communicate it. * * * I say that I have received no information of the affairs of the Pioneer Iron Company or the Iron Cliffs Company as a director or stockholder, for the reason *that I have been made director of those companies*

simply on account of my position as counsel, and for no other reason whatever."

On page 449 this witness says: *"As a director of the Iron Cliffs Company I have met the other directors of the Pioneer Iron Company from time to time.* All the information I have as to whether the Iron Cliffs Company claims to own the stock of the Pioneer Iron Company came to me as counsel, because I was elected a director of the companies simply because I was counsel, to give them advice in their meetings, and that is the reason I decline to answer."

This witness who thus refuses to testify when called by the complainants in the suit on the subject of the ownership by the Iron Cliffs Company of the stock of the Pioneer Iron Company on the ground that his information had come to him as counsel of the companies, *had already testified on the same subject when examined as a witness for his clients, the defendants in the suit*, (the plaintiffs in error) where on cross examination (R. pp. 345, 346.) referring to said circular issued and signed by himself and William G. Mather he says: *"The Iron Cliffs Co. owns some of the stock of the Pioneer Iron Co.* I haven't examined that part of the circular which states that the Iron Cliffs Co. owned the stock of the Pioneer Iron Co. *I have no doubt that statemment was true if we made it at that time. I think that was true, though not of record. They didn't own it of record, the equitable owner of it."*

Re-examined by counsel of plaintiffs in error, he says (R. p. 346): "The Iron Cliffs Co. does not own it all now. Outside of the Iron Cliffs Co. Mr. Garretson owns 50 shares of stock, Mr. Hale owns 960 shares, Mr. Peter White owns 10 shares, I own 10 shares, Mr. Perkins owns 10, Mr. Wade, I think, owns 10, Mr. Samuel Mather 10, and I think there are some other scattering shares owned by other people. I don't exactly recollect."

It is to be observed that under the law and practice in the State Courts of Michigan the statements of a witness upon the cross-examination is as much the testimony on the part of the party calling the witness as are his statements given on the direct examination.

Campau vs. Dewey, 9 Mich., 381, at 417, 418.
Wilson vs. Wagar, 26 Mich., 452, at 458.
Turnbull vs. Richardson, 69 Mich., 400, at 416.
Ireland vs. Railroad Co., 79 Mich., 163, at 164.

It is also to be observed that the witness Hoyt, while counsel for Mather in this case, when testifying as above (R. p. 346.) in Mather's behalf, and in answer to the questions of the solicitor of record of Mr. Mather, states the ownership of the stock of the Pioneer Iron Company, *and does not include William G. Mather as an owner or holder of any of the stock.*

21st. This testimony was given at the trial of the case before the Circuit Judge which took place on and from the 19th to the 23rd of March, 1901. (R. p 52).

At that time Mather did not claim to own, or to hold in trust, any of the stock of the Pioneer Iron Company by his answer in the suit.

(See his answer, R. pp. 40 to 44.)

In this, his original answer, (Paragraph 19, p. 44) Mather, together with the Iron Cliffs Company and the Cleveland Cliffs Iron Company, says:

"19. *And these defendants further answering say they have no personal interest in any of the matters set forth in said Bill, except as they, or some of them, may be stockholders of said Pioneer Iron Co., or as an officer or agent thereof.*"

22nd. It was after the evidence had been closed in the case, and *on June 22nd, 1901*, that Mather by amendment to his answer first set up any claim to ownership of any stock, or to hold in trust any stock in the Pioneer Iron Company.

(R. pp. 49, 52.)

23d. The complainants in the suit sought to procure the testimony of Mather, by taking his deposition at his place of residence (Cleveland), and repeatedly issued subpoenas for him, but the officer's return to the subpoenas in respect to Mather is—"not found."

(R. pp. 430, 438, 441, 463.)

The reason why the defendants in the suit suppressed and refused to produce the books appears from the testimony of C. J. Canda above quoted, that he "surrendered the books of transfer and minute books of the Pioneer Iron Company to Mr. Mather of Cleveland, Ohio, in 1890. They were sent to him at Cleveland. *The stock transfer book would show when the transfer to the Iron Cliffs Co. was made.*"

(R. p. 474.)

24th. After the above depositions were taken which show that the complainants could not procure the evidence of the books of the Iron Cliffs Company, N. A. Gibbs was called by the complainants in the suit and testified that he was in the employ of the Iron Cliffs Company from 1873 to 1893, or 1894; that he was assistant bookkeeper, head bookkeeper and general manager of the Iron Cliffs Company (R. pp. 494, 495); that he was appointed general manager by William G. Mather the President (R. p. 499). He says: "I knew there was such an organization as the Pioneer Iron Co. during these years that I was working for the Iron Cliffs Co. As I consider it, it was all worked as one company." (R. p. 495.)

He further testifies as follows (R. pp. 495, 496):

"Q. Was the Pioneer Iron Company carried as a whole on the books of the Iron Cliffs Co?

A. The way it seemed to be, we had an account on our books called the Pioneer Iron Co., which I suppose was the amount of the purchase price by the Iron Cliffs Co. less whatever profits or losses there may have been by that company up to the time they took charge of it.

Q. You mean to say that was the price they paid for the stock of the Pioneer Iron Co. less the profit or loss?

A. That was the way I always supposed it was, but have no knowledge of my own in regard to it.

Q. How was it carried on the books with reference to being in lump sum or otherwise?

A. It was carried in a lump sum."

Being asked by defendants' counsel (R. p. 501). Who was manager of the Pioneer Iron Company in 1887, 1888 and 1889, he says: "I do not know of any other manager only the one that was manager for the Iron Cliffs and Cleveland Cliffs Company."

On page 502 he says the Pioneer Iron Company did not pay any portion of his (the managers) salary.

Referring to the Iron Cliffs Company's books, the witness says (R. p. 503): "Our books at Negaunee took care of all the expenses of mining, including the salary of manager, until it was put in a separate department, the mining department, and the secretary and treasurer and sales agent paid themselves and their clerk hire. That was all I ever knew of. We used to transfer accounts from their books to ours monthly. We used to transfer accounts at Negaunee. By "we" I mean the Iron Cliffs Company. We transferred the accounts from the secretary and treasurer's office, and also the sales agent at Chicago, sales of ore and iron and money received for the

same, and the expenses of each of their offices; we would transfer all these expenses to our books.

Q. You are now stating your recollection of what the books showed, are you?

A. I know what they showed in regard to these things. I am positive as regards this."

25th. The statutes of Michigan provide for the appointment of a Commissioner of Mineral Statistics, whose duties require him to make report of the status,progress and development of the State's mining and smelting industries, and he is authorized to require individuals and corporations occupied in minig to make reports to him.

1 Howell's Statutes, Secs. 839, 843, 844.

The provisions are as follows:

Sec. 839. "Section 1. The people of the State of Michigan, enact, That it shall be the duty of the Governor of the State of Michigan to appoint, by and with the consent of the Senate, a Commissioner of mineral Statistics for the State; whose duty it shall be to make an annual report to the Governor, setting forth in detail the mineral statistics for the year; with the progress and development of its mining and smelting industries."

Sec. 843. "Section 5. Said commisioner is hereby authorized to demand, and it shall be the duty of all corporations or individuals engaged in mining to make such reports under oath, as to product and other matters as shall be required by him, on blanks to be furnished by said commissioner for that purpose."

Sec. 844. "Section 6. It shall also be the duty of said commissioner to report to the Auditor General on or before the first day of May in each year, the amount of copper, iron, coal, or other mineral produced by each and every corporation

or individual engaged in mining in this State during the preceding calendar year, which reports shall be the basis for computing the specific taxes chargeable against such corporations or individuals, on the amount of mineral produced by them, and in case any corporation or individual engaged in mining in this State shall neglect or refuse to make the reports required by section five of this act, at the time and in the manner therein specified, then it shall be the duty of said Commissioner of Mineral Statistics, to report the amount of specific tax chargeable against such delinquent corporations or individuals."

The complainants in the suit introduced the official reports made under this statute for 1877 and 1878, and previous years, which reports state that, "the Pioneer Iron Company, by whom the furnace was built became subsequently merged into the Iron Cliffs Company." (R. p. 312.)

The report for 1885 states, "The Pioneer Furnace went into blast in February, 1858, and has been continously operated since, saving only such stoppages as necessarily occur. It was originally the property of the Pioneer Iron Company, which company was subsequently, in 1866, *absorbed by the Iron Cliffs Company, that now owns and operates the furnace.*" (R. p. 326.)

The statute of Michigan of 1853, under which the Pioneer Iron Company was organized, required the Pioneer Iron Company to file each year with the Auditor General a report of the number of shares of stock issued by the corporation, the names of the stockholders, and the number of shares held by each at the time of said report, and the amount of iron ore mined within the past year.

Session Laws of Mich. of 1853, p. 54, Sec. 5, p. 57, Sec. 18.

Said statute is as follows:

"Sec. 5. Every such corporation shall annually, in the month of July, make a report, signed by a majority of the Board of Directors containing:

1. The amount of capital actually paid in:
2. The amount invested in real estate;
3. The amount of personal estate;
4. The amount of their debts and credits, as near as may be;
5. The name of each stockholder, and the number of shares held by him, at the date of such report; and every such report shall be verified on oath, by the officers signing the same; and if any person shall, as to any material facts, knowingly swear or afirm falsely, he shall be deemed guilty of perjury, and be punished accordingly."

"Sec. 18. Every such corporation formed for mining purposes, shall annualy in the month of July in each year, make a report, which shall state the amount of copper, iron or other mineral which such company may have mined within the year past, which report shall be signed by the president and a majority of the directors and shall be verified by the oath of the secretary or other officer making the same, and be filed in the office of the clerk of the county in which the business of any such corporation is carried on, and a duplicate thereof in the office of the Auditor General."

A statute was passed in 1877, requiring to be filed in the month of July of each year a more full and particular report, showing not only the names of stockholders and number of shares held by each, but also required a report of the condition of the business of the company, and provided that: "Whenever any corporation ceases to carry on business for one year or more it shall not be required to make such reports until it again commences business."

Session Laws of Mich., 1877, p. 94, 95, Sec. 32 and 33.

1 Howell's Statutes, Sections 4107 and 4108 provide as follows:

Sec. 4107. "It shall be the duty of the president and secretary of each corporation, annually in the month of July, to make a report for the preceding year ending December thirty-first, containing a statement of:

First. The amount of cash paid in on the capital stock;

Second. The amount of capital paid in by the conveyance of property to the corporation;

Third. The entire amount invested in real estate;

Fourth. The amount of personal estate;

Fifth. The amount of the unsecured or floating debt of the corporation, as near as may be;

Sixth. The amount of the secured or bonded debt of the corporation;

Seventh. The amount due to the corporation;

Eighth. The number of gross tons of copper obtained;

Ninth. The number of gross tons of two thousand two hundred and forty pounds each, of iron ore mined and shipped;

Tenth. The number of gross tons of mineral coal mined;

Eleventh. The number of gross tons of pig iron manufactured;

Twelfth. The number of tons of any other mineral or ore mined;

Thirteenth. The amount of slate or stone mined;

Fourteenth. The name of each stockholder of record and the number of shares held by him on the said thirty-first day of December and when stock is held in trust or in some representative capacity, it shall be so stated."

Sec. 4108. "Such report shall be executed in duplicate by said president and secretary, and shall be sworn to before some officer authorized to administer oaths. If sworn to

outside the limits of the State it shall be before a commissioner for Michigan, a notary public having a seal, or any other person authorized to take acknowledgments of deeds. Such duplicate report shall be filed on or before the thirty-first day of July annually, one copy with the Auditor General of this State and the other with the clerk of the county in this State where the mine or smelting or manufacturing works of the corporation are principally or wholly situated. If any person signing such puplicate report shall, as to any material facts therein stated wilfully swear falsely, he shall be deemed guilty of perjury. Blank reports shall be prepared by the Auditor General and furnished to any corporation on application therefor. *Whenever any corporation ceases to carry on business for one year or more it shall not be required to make such reports until it again commences business.*"

It is shown by the evidence that no such reports, either of its stockholders, or of its business were made by the Pioneer Iron Company after the year 1860.
(R. p. 85.)

In 1855, a statute was passed, requiring every mining corporation having shares of stock to file with the Secretary of State, within ninety days after the passage of the Act, and annually thereafter, on or before the first of January of each year, a list of the number of shares issued by the corporation, and the names of the owners thereof with the number of shares owned by each.

Session Laws of Mich. of 1855, p. 277, Sec. 3.
2 Howell's Statutes, Sec. 9351.

The statute is as follows:

Sec. 9351. "Every banking, insurance, mining, plank or other incorporated company, who issue scrip *or shares*, shall within ninety days after the passage of this act, file with the

Secretary of State a list of the number of shares issued by said corporation, and the names of the owners thereof, with the number of shares owned by each; *and annually thereafter* shall file with said Secretary of State, on or before the first day of January, in each and every year a statement similar to that above required, showing the ownership of the shares of said corporation at the day of the date of said statement; all of which statements, including the first, shall be made by one of the officers of said company, under oath."

It is shown by the evidence that no report under this statute was made to the Secretary of State after the year 1860.
(R. p. 516.)

The inference to be drawn from the above evidence is that the Pioneer Iron Company had become merged in and absorbed by the Iron Cliffs Company; that its stock was owned by that company, and that it carried on no business.

26th. Notwithstanding the foregoing evidence showing that all of the stock of the Pioneer Iron Company was owned by the Iron Cliffs Company at the commencement of this suit, *Mr. Mather did not testify in the case at all*, and offered no evidence for the purpose of showing his ownership of stock in the Pioneer Iron Company.

It may be observed that the evidence in the case was taken before the Circuit Court in which the suit was instituted during the period from the 19th of March 1901, till the 23rd day of March, 1901.
(R. p. 52.)

27th. *Afterwards*, and on the 4th day of April, 1901, under the supervision of James H. Hoyt, Mr. Mather's counsel, and acting by his proxy, supplementary reorganization proceedings were taken to *reorganize* the Pioneer Iron Company, in which proceedings William G. Mather is made to appear

as a holder, as trustee, of 3930 shares, and as a holder personally of 10 shares.

These proceedings were put in evidence by the defendants in the suit and appear in the Record at pages 529 to 532.

The holding of these shares in these proceedings is evidently the same holding of the shares represented in the proceedings above referred to taken on the 25th of October 1890, for the amendment of the articles of reorganization, which were adopted October 7th 1889, (R. p. 517) and which holding was shown to be a holding for the Iron Cliffs Company *by the statement of Mather himself in his circular of February* 19th, 1891, *above referred to, in which circular he stated that the Iron Cliffs Company owned the stock of the Pioneer Iron Company.* (R. p. 345 at 348). This circular, signed also by James H. Hoyt, the latter testified was true.
(R. p. 346.)

Third. On the evidence given in the case, the Supreme Court of Michigan was clearly authorized to find that the case made by the Bill of Complaint is sustained, viz:

That the complainants in the suit were the owners of the lands in question, subject to the lease of September 17th, 1857, executed by Charles T. Harvey to the Pioneer Iron Company, by the provisions of which lease the only mining authorized to be done thereunder was limited *to mining to be done exclusively and solely by the Pioneer Iron Company of ore which the Pioneer Iron Company alone should actually convert into merchantable iron in the Pioneer Iron Company's own furnaces or forges;* that the charter of the Pioneer Iron Company expired on the 2nd of April, 1887, by the term of its existence prescribed in the charter; *that the Pioneer Iron Company had long since entirely ceased to do any business; that its furnaces had been dismantled and destroyed; that the right*

to mine under such lease was appurtenant to such furnaces or forges; that all the stock of the Pioneer Iron Company had been acquired and was held by the Iron Cliffs Company; that the stock of the Iron Cliffs Company was owned by the Cleveland Cliffs Iron Company; *that these two companies, together with William G. Mather and Murray M. Duncan had formed and were engaged in a scheme to make use of the name of the Pioneer Iron Company as a means by which the Iron Cliffs Company and the Cleveland Cliffs Iron Company might mine and remove ore from said lands, obtaining the benefit thereby of the provisions of said lease, and that the mining was not done by the Pioneer Iron Company, whether it had ceased to exist or was still in fact in existence; that mining so done by the Iron Cliffs Company and the Cleveland Cliffs Iron Company was unlawful and was a trespass, and an irreparable injury to the complainants in the suit, and that the Court was authorized to enjoin the acts of the defendants in the suit in carrying on such mining.*

Fourth. The finding and decision of the Supreme Court of Michigan. (The italics are ours.)

The opinion of the Court, delivered by Justice Grant, after stating the case of the Bill of Complaint, says (R. p 568): "We think, however, the main purpose of the Bill is, *not to* "*declare a forfeiture of the lease, but to determine the rights* "*of the parties, which depend largely upon the construction* "*of the deeds, the leases, and the various acts and conduct* "*of the parties, extending over a period of more than 40 years,* "*and to enjoin a continuing trespass.* The case is one "peculiarly appropriate to a Court of Equity.

"The Bill sets forth three notices in the name of the Pioneer "Iron Company, that it had entered upon the disputed lands "for the purpose of mining iron ore. It is, therefore, appar-

"ent that numerous acts of trespass and the removal of valu-
"able ore were threatened. The defendants are not in posses-
"sion. * * * Whether or not under these circumstances,
"ejectment would lie, we need not determine. Complianants
"being in possession of the property, if their title is valid,
"*irreparable injury was threatened by the defendants. Such*
"*trespasses a Court of Equity will enjoin.*"

Referring to the objection that the Pioneer Iron Company is not made a party to the suit, the Court uses this language: (R. pp 569 570): "It is also urged as a fatal objection to
"the maintenance of the Bill that the Pioneer Iron Company
"is not made a party. Under the allegations of the Bill, *and*
"*as well under the proofs, the Pioneer Iron Company is used*
"*as a 'dummy' for the benefit of the defendant* COMPANIES.
"The defendants own, and have owned for many years, *all its*
"*capital stock*, its furnaces and property, both real and person-
"al. They have managed all its affairs, and for their own
"benefit. All its accounts if any have been kept in the
"name of the Pioneer Iron Company, *have been kept upon the*
"*books of the defendants.* The defendants refused upon the
"trial to produce the books of the Pioneer Iron Company, or
"their own books showing the accounts. Some of its officers
"having charge of the books were produced as witnesses, and
"testified to the above facts. Under these circumstances these
"defendants cannot escape the consequence of their acts done
"*in the name of the Pioneer Iron Company for their own*
"*benefit.* Admitting that the Pioneer Iron Company is not
"a dead corporation, *yet all its property, franchise, and rights*
"*are owned by the defendant companies*, so far as the rights
"under the 99 year lease are concerned, and are fully repre-
"sented by those now before the Court. The theory of the
"complainants as stated in their Bill, is that the Pioneer Iron
"Company is a dead corporation; its charter expired by limi-

"tation April 2, 1887; and that no steps were taken for some "time thereafter to reorganize the corporation under the "amendment to the Constitution and the Law; and that that "action was wholly invalid. *The Pioneer Iron Company "therefore, was not a necessary party.* (Citing authorities.) "Complainants could not well have made the Pioneer Iron "Company a party defendant *without recognizing it as an "existing corporation.* Its existence was in issue, and, *having "expired by limitation of its charter,* the burden of proof "was upon the defendants to show a valid reorganization, so "as to make it the successor of the company within the terms "of the 99 year lease. *Equity will enjoin the threatened acts "of those assuming to act within the name of a dead corpora-"tion.* (Citing authorities.)

"3. The further answer to those objections to the juris-"diction of the Court is that they should have been raised by "demurrer. The facts upon which they are based are ap-"parent upon the face of the Bill. The defendants having "answered, put the case at issue upon the merits, and taken "proofs upon that issue, cannot now raise the question of "jurisdiction."

(Citing authorities.)

The Court then states (R. p. 570.) that whatever interests in the lands Reynolds reserved to himself which were assignable by him or descendable to his heirs, the complainants owned by appropriate deeds. Whatever interests are not now vested in the Pioneer Iron Company by the 99-year lease are also owned by complainants by appropriate conveyances from Harvey.

The Court then considers (R. pp. 570, 571, 572) the question in respect to what interests Reynolds conveyed to Harvey and what interest he retained in himself, which interest passed to the complainants, and con-

cluded the consideration of this question by saying (R. p. 572): "The conduct, therefore, of these defendants "is consistent only with the theory that they recognized the "title to an undivided half of the minerals to be in these "complainants."

The Court next takes up the question of the construction of the 99 year lease, which is the lease in question, and says (R. p. 573): "The 99 year lease conveyed to the Pioneer Iron "Company only an indivisible, incorporeal, and *personal right* "*to mine ore, and then only for such as it should actually* "*convert into merchantable iron at its own furnaces or* "*forges. It granted only certain rights and privileges for a* "*specific purpose. It prohibited assignment and the mining* "*of ore for furnaces not owned by the company.*"

After referring to the right reserved to Harvey, his heirs and grantees to mine ore, and the effect of the conveyance made by Harvey as a division of this incorporeal hereditament, the opinion proceeds as follows (R. p. 573): "Was this right "to mine ore under this lease *appurtenant to the furnace then* "*existing?* It is true that the lease itself does not in express " terms limit it to the then existing furnace. We must, there- "fore, look to the situation of the parties, the object in con- "templation, and the surrounding circumstances, in determin- "ing the question."

After referring to the situation of the parties, the object in contemplation and the surrounding circumstances, the opinion says (R. pp. 574, 575): "We therefore conclude that "the Pioneer Iron Company contemplated, provided for, and "erected only one furnace with two stacks; that the parties "contracted with reference to that furnace; *and that the min-* *ing right conveyed was appurtenant to the furnace.*"

"6. *By the voluntary act of the defendant companies,* "*who, since 1866, operated it, the furnace was dismantled in*

"1894, *and totally destroyed. It has never been rebuilt, and* "*there evidently was no intention to rebuild it. The abandon-*"*ment and destruction of the furnace also destroyed the ap-*"*purtenant right to mine the ore under the lease. Nothing* "*was left for the right to be appurtenant to.* * * * "

"7. Soon after the execution of the 99-year lease, the "Pioneer Iron Company made some explorations upon certain "portions of the land covered thereby found ore, but not in "paying quantities, abandoned the explorations, and for full "43 years made no attempt to avail itself of this mining right. "In 1866, it conveyed to the Iron Cliffs Company by lease for "a period of ten years 'all its iron works, buildings, lands and "rights, etc.,' (reserving, however, certain rights and privileges "not necessary to mention), and provided by the lease that "dividends should be paid directely to its stockholders rather "than into its treasury. *The Iron Cliffs Company afterwards* "*became the owner of all its stock, and thereafter carried on* "*the furnace business. The Pioneer Iron Company never* "*thereafter took any control of its furnace. It was regarded* "*as merged in the Iron Cliffs Company.*"

The conclusion of the Court was that the decree from which appeal was taken to the Supreme Court of the State be affirmed (R. p. 576). That decree adjudged: "That the "defendants, their counselors, attorneys, solicitors and agents, "and each and every of them whether acting in their individ-"ual or representative capacity, immediately vacate and remove "from the lands described in the Bill of Complaint, and that "they and each of them, be and they hereby are perpetually "enjoined from further entering upon the said lands of the "complainants for the purpose of exploring for or taking "therefrom any minerals or iron ore, or for any purpose what-"ever, without the consent and authority of the complainants." (R. p. 559.)

The decision of the Supreme Court of Michigan is to this point, viz: That the complainants in the suit are the owners of the lands in question, subject to the right to mine ore therefrom granted to the Pioneer Iron Company by the lease of September 17th, 1857, made by Charles T. Harvey to the company, *which right under the lease was limited to the Pioneer Iron Company and was made appurtenant to that company's furnace, and was not assignable.* The furnace to which the rights to mine ore were made appurtenant was dismantled and destroyed in 1894 and has never been rebuilt.

The Iron Cliffs Company acquired and owned all the stock of the Pioneer Iron Company and the Iron Cliffs Company and the Cleveland Cliffs Iron Company make use of the Pioneer Iron Company as a dummy to do the work of mining upon the lands. The defendants in the suit "*cannot escape "the consequence of their acts done in the name of the Pioneer "Iron Company for their own benefit.*" These acts are the acts complained of and claimed by the defendants,viz: Exploring for and mining ore on said lands. The defendants in the suit are enjoined from doing such acts.

Fifth. Assuming William G. Mather to be a stockholder in the Pioneer Iron Company, and that the company is still in existence, if in fact Mather, for his own benefit and for his own purposes made use of the name of the Pioneer Iron Company as a cover for his acts, mined ore to be sold to other parties, or to be used in his own furnaces, a suit against him alone to enjoin him from such acts would not deprive him of his property without due process of law on the ground that the Pioneer Iron Company was not made party to the suit, and would involve no Federal question.

The Federal question set up by the amendment to Mather's answer, viz: That by reason of his being a stockholder in the Pioneer Iron Company, a decree declaring a forfeiture or

termination or expiration of the lease, or in any way affecting the rights of the Pioneer Iron Company, would deprive said Mather of his property without due process of law, because the Pioneer Iron Company was not made a party to the suit, was not considered or decided by the State Court.

The judgement of the Court was entirely and distinctly based on the ground that under the terms of the lease the defendants in the suit had no right to mine and remove ore from the lands, and had no right to make use of the Pioneer Iron Company as a dummy, or to make use of its name for the purpose of mining and removing such ore.

Sixth. The Supreme Court did not, as alleged in the assignments of error, terminate or cancel or declare a forfeiture of the lease executed by Charles T. Harvey to the Pioneer Iron Company, or adjudge the lease to have been destroyed or terminated, nor does the judgment or decree of the Court cut off, or destroy, or affect in any way, the franchises, rights or interests of the Pioneer Iron Company, nor in any manner destroy, diminish or affect the interests of the stockholders of that company. The Pioneer Iron Company is not in any manner deprived of or affected in its rights by suit or by other means to assert or determine its rights to mine ore under the lease. Not being a party to the suit, its rights and the rights of its stockholders remain as though the suit had not been instituted.

The determination of the decree of the Court is that the Iron Cliffs Company, the Cleveland Cliffs Iron Company, William G. Mather and Murray M. Duncan have no right to mine ore from the lands under the cover of the name of the Pioneer Iron Company, or by using that company as a dummy; that by the terms of the lease the mining of ore from the lands is limited to a personal right of the Pioneer Iron Company to mine such ore as it should actually convert into merchantable

iron at its own furnace, which existed when the lease was made, and which furnace the Iron Cliffs Company and the Cleveland Cliffs Iron Company dismantled and totally destroyed in 1894, and that the acts done by the defendants in the suit in exploring for and mining ore which are complained of and enjoined are not the acts of the Pioneer Iron Company, but are personal acts of the defendants in the suit which they have no right to do under the terms of said lease.

Seventh. It appearing that the judgment of the State Court was based upon such non-Federal and independent ground, the Court will not consider whether the decision of the State Court was sound or an unsound decision, and will dismiss the Writ of Error on the ground that the decision of the State Court as rendered by that Court did not involve a Federal question.

Klinger vs. State of Mo., 13 Wall., 257, at 263.
De Saussure vs. Gaillard, 127 U. S., 216, at 233, 234.
Dibble vs. Bellingham Bay Land Co., 163 U. S., 63, at 69
Howard vs. Fleming, 191 U. S., 126, at 135.
Israel vs. Arthur, 152 U. S., 355, at 362.

The determination and decision of the State Court upon facts which are found from the evidence in the case are conclusive, and will not be reviewed by this Court.

Dower vs. Richards, 151 U. S., 658, at 663.
Israel vs. Arthur, 152 U. S., 355.
Egan vs. Hart, 165 U. S., 188, at 189.
Allen vs. So. Pac. R. Co., 173 U. S., 479, at 489.
Telluride Power &c Co. vs. Railway Co., 175 U. S., 639, at 645.
Telluride Power &c Co. vs. Railway Co., 187 U. S., 569, at 584.

It is respectfully submitted that the Writ of Error should be dismissed.

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